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BEFORE THE

Federal Communications Commission

WASHINGTON, D. C.

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JAN 25 1993

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of	)	
	)	
Implementation of Section 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992	)	MM Docket No. 92-265
	)	
Development of Competition and Diversity in Video Programming Distribution and Carriage	)	

COMMENTS OF TELE-COMMUNICATIONS, INC.

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TABLE OF CONTENTS

SUMMARY. iii

I. Introduction 2

II. A Violation of Section 628 Requires a Showing of Significant Harm to Competition 5

III. The Two Elements of the Test Required Under Subsection (b) of Section 628 7

A. Determining Whether Particular Conduct Constitutes "Unfair Methods of Competition or Unfair or Deceptive Acts or Practices" 8

1. Section 628 Applies Only in Areas Where a Programmer is Actually Vertically Integrated . 10

2. The Commission Should Use the Practices of Non-Vertically Integrated Programmers to Assess Conduct Under Section 628 11

3. The Commission Should Create a Safe Harbor for Certain Pricing Practices by Vertically Integrated Programmers 12

4. The Commission Should Apply Section 628 Prospectively Only 16

5. Discounts Based on the Number of Subscribers Served by a Distributor Are Permissible Under Section 628 18

6. Exclusive Contracts Should Be Prohibited Only Where They Deprive an Alternative Distributor of a Vital Product 23

B. Determining What Constitutes Conduct that "Hinders Significantly" or "Prevents" a Distributor From Providing Service to Consumers . . 30

V. The "Undue Influence" Standard of Section 628(c)(2)(A) and the "Conditioning" and "Coercion" Standards of Section 616(a)(1) and (2) Require a Showing of Explicit Threats or Intimidation in Order to Render Conduct Illegal 33

VI. The Commission Should Adopt Complaint Procedures That Allow For Full and Fair Development and Adjudication of the Complex Factual and Legal Issues Likely to Arise Under Rules Regulating Program Contracts 37

A. The Abbreviated, Summary Procedures Adopted for Lowest Unit Charge Complaints Are Not Appropriate for Program Access Complaints 38

B. Conventional Pleading Practices and Trial Type Hearings Before and Administrative Law Judge Will be Required in Most Program Access Disputes 39

C. Forfeitures Should Not Be Imposed for a Violation of Section 628 Unless the Violation is Willful and Repeated 43

VII. Conclusion 44

SUMMARY

Two elements must be present before a vertically integrated programmer's conduct falls within the restriction of Section 628: 1) the conduct must constitute an "unfair" or "deceptive" method of competition; and 2) it must "hinder significantly" or "prevent" competition in the marketplace.

Determining what constitutes "unfair" or "deceptive" conduct raises complex and factually intensive issues that involve difficult subjective judgments. The Commission would contribute to marketplace certainty and administrative ease by adopting reasonably objective standards, including: 1) Section 628 should apply only in areas where a programmer is actually vertically integrated; 2) the Commission should use the conduct of non-vertically integrated programmers to assess conduct under Section 628; 3) the Commission should create a safe harbor for certain pricing policies of vertically integrated programmers; 4) Section 628 should apply prospectively only; 5) volume discounts should be presumed lawful; and 6) exclusivity should be prohibited only if it deprives a rival distributor of programming vital to its competitive survival.

A programmer's conduct should be considered to "hinder significantly" or "prevent" competition only if a distributor demonstrates that, as a result of such conduct, it is unable to deliver alternative programming which would enable it to achieve similar revenues. Only if a distributor's competitive viability is threatened, does it have a legitimate claim under Section 628.

Because hard bargaining is natural and useful in negotiations between suppliers and distributors, the law accommodates such practices. As the Commission interprets the "undue influence" standard of Section 628(c)(2)(A) and the "conditioning" and "coercion" standards of Section 616(a)(1) and (2) it also must allow for such negotiations and find a violation only if there is a showing of explicit threats and intimidation.

The complex nature of the determinations required under Section 628 compel the Commission to adopt complaint procedures that allow for full and fair development and adjudication of the issues.

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COMMENTS OF TELE-COMMUNICATIONS, INC.

Tele-Communications, Inc. ("TCI") hereby files its comments in the above-captioned proceeding.[1] Attached to TCI's Comments is a paper prepared by Stanley M. Besen, Steven R. Brenner, and John R. Woodbury, entitled "Exclusivity and Differential Pricing for Cable Program Services", (hereinafter the "Besen Paper"), which analyzes many of the issues raised in this proceeding. TCI, through its operating subsidiaries, is a multiple systems operator providing cable service in 49 states to approximately nine million subscribers. TCI is thus an interested party in this proceeding.

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[1] Notice of Proposed Rulemaking in MM Docket 92-265, FCC 92-543 (rel. Dec. 24, 1992) ("Notice").

I. Introduction

Section 628 of the Cable Television Consumer Protection and Competition Act of 1992 (the "Act")[2] focuses on the development of competition and diversity in video programming distribution (Section 628 is commonly referred to as the "program access" provision.) Congress began considering program access as early as 1985[3] and demonstrated a steady interest in these issues throughout the period ending with passage of the Act in 1992.[4]

During the course of Congress' seven-year consideration of program access, the video program distribution marketplace changed significantly. In the early 1980s, some satellite programmers authorized only limited distribution of their services by non-cable distributors. There were legitimate reasons for such a decision. Some non-cable distributors, for example, multi-point distribution ("MDS") systems, were

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2 Pub. L. No. 102-385, 106 Stat. 1460 (1992).

3 See H.R. 1840, 99th Cong., 1st Sess. (1985); S. 1618, 99th Cong., 1st Sess. (1985).

4 See,e.g., Cable Television Regulation: Hearings on H.R. 1303, 2546 Before the Subcomm. on Telecommunications and Finance of the House of Representatives Comm. on Energy and Commerce, 102nd Cong., 1st Sess. (1991); Ensuring Access to Programming for the Backyard Satellite Dish Owner: Hearings on H.R. 1769, 1840, 3989, Before the Subcomm. on Telecommunications, Consumer Protection, and Finance of the House of Representatives Comm. on Energy and Commerce, 99th Cong., 2d Sess. (1986); Oversight of Cable TV: Hearings on the Oversight of the 1984 Cable Telecommunications Act Before the Subcomm. on Communications of the Senate Comm. on Commerce, Science, and Transportation, 101st Cong., 1st Sess. (1989).

experiencing significant technical and financial difficulties.[5] Other distribution technologies, such as home satellite dish systems ("HSD") and multi-channel multi-point distribution services ("MMDS") were in the initial stages of their development with unproven technical, financial, and marketing capabilities.[6] During this period, it was natural that programmers dealt with such technologies on a relatively limited basis.

However, as these distribution technologies developed and proved themselves viable in the marketplace, programmers increasingly began to utilize them for distribution of their product. During the latter period of the 1980s, distribution of satellite programming services by non-cable distributors grew steadily and impressively.[7] As the Commission recently recognized, today many satellite program services are available for distribution by non-cable technologies and these alternative

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[5] See Amendment of Parts 2, 21, 74 and 94 of the Commission's Rules and Regulations in Regard to Frequency Allocation to the Instructional Television Fixed Service, the Multipoint Distribution Service, and the Private Operational Fixed Microwave Service, Gen. Docket 80-112, CC Docket 80-116, 54 R.R. 2d 107 (1983); see also H.R. Rep. No. 628, 102nd Cong., 2d Sess. 44-47 (1992) ("House Report").

[6] See House Report at 44-46; Inquiry into the Scrambling of Satellite Television Signals and Access to Those Signals by Owners of Home Satellite Dish Antennas, 2 FCC Rcd 1669 (1987); Inquiry into the Existence of Discrimination in the Provision of Superstation and Network Station Programming, 5 FCC Rcd 523, 524 (1989)("First HSD Programming Inquiry Report").

[7] See generally Inquiry into the Scrambling of Satellite Television Signals and Access to Those Signals by Owners of Home Satellite Dish Antennas, 3 FCC Rcd 1202 (1988) ("Second Scrambling Report").

technologies, particularly the HSD business, are a strong, expanding segment of the video distribution marketplace.[8]

As the marketplace evolved, Congress' views on program access changed as well. This is not surprising because Congress held numerous hearings on program access and related issues throughout this period.[9] Thus, as the marketplace evolved in a way that addressed Congressional concerns, Congress began to adjust the proposed legislation.

By the time Section 628 was passed in 1992, the marketplace was very different than in the early 1980's when Congress first took up the issue. So too was the Act very different than when Congress first considered the legislation. The law Congress passed specifically adopts the traditional requirement that a programmer's conduct must cause significant harm to competition in the marketplace before it is considered a violation of Section 628. By its terms, it does not require, or indeed permit, the Commission to develop rules to mandate (or prohibit) specific contractual terms between programmers and distributors in the absence of a specific factual showing of marketplace harm.

The Commission should consider Section 628 in the context of this history. Congress did not pass a law designed for a 1985 marketplace. The Commission should not promulgate regulations for a 1985 marketplace.

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8 See First HSD Programming Inquiry Report, 5 FCC Rcd at 531; Second Scrambling Report, 3 FCC Rcd at 1208-1211.

9 See supra note 4.

II. A Violation of Section 628 Requires a Showing of Significant Harm to Competition

Subsection (b) contains the principal prohibition in Section 628: "a vertically integrated satellite cable programming vendor" may not "engage in unfair methods of competition or unfair or deceptive acts or practices, the purpose or effect of which is to hinder significantly or to prevent any multichannel video programming distributor from providing satellite cable programming or satellite broadcast programming to subscribers or consumers."[10]

The plain language of subsection (b) requires that two elements must be present before a vertically integrated programmer's conduct falls within the restriction of Section 628: 1) the conduct must constitute an "unfair" or "deceptive" method of competition; and 2) it must "hinder significantly" or "prevent" competition in the marketplace.

Thus, a showing that the vertically integrated programmer's conduct significantly harms competition is an indispensable precondition to a finding that the conduct is prohibited under Section 628. The legislative history supports this analysis.[11]

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[10] 47 U.S.C. Sec. 548(b). The title of subsection (b) -- "PROHIBITION" -- is a clear indication that it contains the central restriction of Section 628.

[11] See, e.g., H.R. Conf. Rep. No. 862, 102nd Cong., 2d Sess. 92-93 (1992) ("Conference Report"); S. Rep. No. 92, 102nd Cong., 1st Sess. 24 (1991) ("Senate Report"); 138 Cong. Rec.

Subsection (c) also supports this conclusion. Subsection (c) requires the Commission to promulgate certain regulations, primarily relating to price and contract exclusivity. However, subsection (c) requires those regulations only to effectuate the principal prohibition in subsection (b). Subsection (c)(1) states that the Commission shall "prescribe regulations to specify particular conduct that is prohibited by subsection (b)." (Emphasis added.) Thus, the regulations required in subsection (c) must be limited to practices that, pursuant to subsection (b), "hinder significantly" or "prevent" competition in the marketplace.

TCI believes this interpretation of the relationship between subsections (b) and (c) is required based on the plain meaning of the language of the provision. The interpretation is also compelled by generally accepted principles of statutory construction, which require that effect must be given to all the words of the statute read as a whole.[12] If the enumerated regulations in subsection (c) are not interpreted and qualified in light of the standards in subsection (b), the Commission will have impermissibly read the second element of subsection (b), relating to harm to competition in the marketplace, out of the statute.

H6533 (daily ed. July 23, 1992) (statement of Cong. Tauzin); 138 Cong. Rec. H6541 (daily ed. July 23, 1992) (statement of Cong. Harris); 138 Cong. Rec. S736-737 (daily ed. Jan. 31, 1992) (statement of Sen. Gore).

[12] 2A Sutherland, Statutory Construction, Secs. 46.05, 47.17 (1992 Rev.).

Moreover, even if standards requiring significant harm to competition were not expressly contained in subsection (b), the courts would be likely to read them into the statute, much as they read the rule of reason into the Sherman Act, a statute which on its face would outlaw every restraint of trade no matter how insubstantial.[13] Here, in contrast to the provisions of the Sherman Act, Congress included clear direction that acts of discrimination that do not "hinder significantly" or "prevent" competition are outside the scope of the provision. Congress thus avoided the necessity for judicial creation of a reasonableness standard in Section 628 by establishing one itself.

TCI will now address each of the two parts of the Section 628 test.

III. The Two Elements of the Test Required Under Subsection (b) of Section 628

In the Notice, the Commission states its intent to develop regulations that satisfy Congressional intent "without restraining the amount of multichannel programming available by precluding legitimate business practices common to a competitive marketplace."[14] TCI strongly endorses this guiding principle.

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[13] See Sherman Act, 15 U.S.C. Sec. 1; see also Standard Oil Co. v. United States, 221 U.S. 1 (1911).

[14] Notice at para. 1 (emphasis added).

Clearly, Congress did not intend to force the cable industry to operate in a manner substantially different from other American businesses. Rather, it sought to ensure that the industry operated in a manner consistent with normal competitive markets. Therefore, the Commission properly concluded that practices which are legitimate and common to other industries should not be barred in the cable industry.[15]

A. Determining Whether Particular Conduct Constitutes "Unfair Methods of Competition or Unfair or Deceptive Acts or Practices"

TCI believes that an "unfair" method of competition or an "unfair or deceptive" practice within the terms of Section 628 is any act by a vertically integrated programmer which is taken not in its business self-interest, but to benefit a commonly-owned and attributed cable operator. In other words, where a programmer's motivation is solely to benefit its commonly-owned cable operator, the conduct is unfair. (As noted above, however, a finding that such an act is unfair or deceptive does not mean that it violates Section 628. A demonstration that the act or practice has a significant harmful effect on competition is a prerequisite to a violation of Section 628.)

The terms "unfair" and "deceptive" are inherently subjective. Notwithstanding that some legal principles can be

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[15] Id.

applied to the terms and that there are analytical precedents, making these determinations is complex and factually intensive, and ultimately requires a good deal of subjective judgment. The result is that determinations of this kind are hotly contested by the implicated parties and difficult and time-consuming to resolve. Marketplace uncertainty and uneconomic diversion of capital and extensive executive attention are common side effects.

TCI therefore recommends that the Commission adopt standards for assessing conduct under Section 628 that are objective, or at least contain some element of objectivity, as a proxy for determining what constitutes "unfair" or "deceptive." In addition, the Commission should adopt certain limiting definitions, or "safe harbors," that exclude conduct that could not possibly result in the harm to competition required by subsection (b) of Section 628. By adopting these approaches, the Commission will substantially benefit the public by avoiding confusion in the marketplace and eliminating wasteful and unnecessary legal and administrative costs.

1. Section 628 Applies Only in Areas Where a Programmer is Actually Vertically Integrated

In enacting Section 628, Congress was concerned with competitive practices resulting from vertical integration.[16] The focus on vertical integration is clear from the language of the statute. The subsection (b) prohibition is imposed on "a satellite cable programming vendor in which a cable operator has an attributable interest."[17] Similarly, the terms of subsection (c)(2) clearly address vertical integration.

Because Congress was concerned with the effects of vertical integration, TCI believes Section 628 should only apply in areas where a programmer is actually vertically integrated, i.e., only in those locations where the programmer has an attributable interest in the cable operator serving that location. This is the only location in which the practices Congress was concerned with can occur. A vertically integrated programmer has neither the incentive, nor the ability, as a result of its verticality, to favor a cable operator with which it has no ownership connection.

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[16] The Commission recognized the benefits of vertical integration in the Notice at para. 5 and elsewhere. See e.g., Competition, Rate Deregulation and the Commission's Policies Relating to the Provision of Cable Television Service, 5 FCC Rcd. 4962, 5008-5010 (1990) ("1990 Cable Report").

[17] 47 U.S.C. Sec. 548(b). In addition, the legislative history of the Act reflects Congressional preoccupation with vertical integration. See, e.g., House Report at 41; Senate Report at 24-29.

To read the statute to apply in other areas would be illogical. If Congress believed vertically integrated programmers would unfairly favor cable operators in which they had no ownership or other controlling interest, it only could have reached that conclusion based on something other than verticality, since no verticality exists in that situation. Had Congress reached that conclusion, it would not have exempted non-vertically integrated programmers from Section 628.

Congress clearly was focused on the vertical relationship between a programmer and a cable operator. Therefore, the Commission should find that Section 628 applies only in locations where that relationship exists.

2. The Commission Should Use the Practices of Non-Vertically Integrated Programmers to Assess Conduct Under Section 628

Similarly, if a vertically integrated programmer's practices are substantially similar to those of a non-vertically integrated programmer, those practices should be presumptively lawful under Section 628. Again, Congress excluded non-vertical programmers from the reach of Section 628. It only would have done so if it believed that the practices of non-vertical programmers were appropriate and legitimate responses to the marketplace. Therefore, in assessing whether a vertically integrated programmer's practices are within the prohibition of Section 628, the Commission may properly be guided by the conduct of non-vertically integrated programmers. As a general proposition, the Commission should find that, if a particular practice of a vertically integrated programmer is common among non-vertical programmers, there should be a presumption that the vertically integrated programmer's practice does not violate Section 628.

Using the practices of non-vertical programmers as a comparison for the conduct of vertically integrated programmers under Section 628 has the advantage of giving the Commission a reasonably objective measuring stick. Such a measurement would go a long way to creating market stability by clarifying for programmers and operators what their rights and obligations are under Section 628. Also, it would avoid the inherently subjective nature of a determination of what constitutes an "unfair" or "deceptive" practice, with the consequent potential to engage the Commission and the courts in a morass of costly and time-consuming adjudications.

3. The Commission Should Create a Safe Harbor for Certain Pricing Practices by Vertically Integrated Programmers

In paragraphs 19-23 of the Notice, the Commission proposes to develop standards for distinguishing between justifiable and discriminatory price differences and identifies several options that could be used to accomplish that objective. TCI agrees with this general approach and believes it will contribute significantly to the desired marketplace certainty.

TCI believes that Option One, described in the Notice at paragraph 20, is a reasonable method for identifying pricing practices that should be presumptively lawful under Section 628. In effect, the Commission should create a zone of reasonableness within which a vertically integrated programmer may freely set its wholesale prices to distributors with confidence that its conduct will not violate Section 628.

Under this approach, any price to a distributor that is not more than a specified percentage (or other suitable measurement, such as an absolute price differential) greater than a vertically integrated programmer's price to a rival distributor falls within the safe harbor. To set the appropriate range, the Commission should look at the pricing policies of non-vertically integrated programmers. As noted above, this would be consistent with the language of the statute and Congressional intent as evidenced by the fact that Congress excluded non-vertical programmers from the scope of Section 628. The Commission need not base the safe harbor on the largest price differential among non-vertical programmers. Rather, it can adopt a range that reflects common pricing practices among non-vertical programmers.

There should be no inference that pricing disparities that fall outside the safe harbor are unlawful under Section 628. Rather, the safe harbor is simply a mechanism to exempt certain acts or practices from Section 628. Moreover, even if the pricing is deemed "unfair" or "deceptive" within the meaning of Section 628, no violation of that Section can be found without a demonstration that the practice is causing the significant harm to competition required under subsection (b).

There is related precedent for the safe harbor concept. The 1985 U.S. Department of Justice Vertical Restraints Guidelines (Sec. 4.1) utilize a market structure analysis that "provides a safe harbor for the use of vertical restraints."

TCI does not support Option Two, described in paragraph 21 of the Notice, and believes it is inappropriate for the Commission to import the common carrier concepts of Section 202 of the Communications Act[18] into the video programming business. It is clear that Congress did not intend the Commission to utilize common carrier concepts regarding the video programming business.[19]

Similarly, TCI does not believe the Commission should adopt Option Three, regarding the standards for illegal price discrimination that were developed under the Robinson-Patman Act (the Commission's Option 3 at para. 22 of the Notice). That Act has been severely criticized by commentators[20] and the courts[21]

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[18] 47 U.S.C. Sec. 202(a).

[19] See 47 U.S.C. Sec. 522(7).

[20] In The Antitrust Paradox (1978), Robert H. Bork characterized the Robinson-Patman Act as "the misshapen progeny of intolerable draftmanship coupled to wholly mistaken economic theory." (p. 382).

[21] See, e.g., Zoslaw v. MCA Distributing Corp., 693 F. 2d 870, 887 (9th Cir. 1982).

as being antithetical to competition and consumer welfare. At the very least, the Commission should not adopt a theory sometimes propounded in Robinson-Patman Act cases that injury in a "secondary line" case (injury to competition among competitors of the favored purchasers) may be established by a mere showing that business is shifted from the disfavored to the favored customer. Rather, the Commission should follow those cases holding that where there are many sellers there can be no competitive harm to a disfavored distributor merely because its competitor received a more favorable price.[22]

Likewise, the Commission certainly should not follow the rule of FTC v. Morton Salt Co., that the mere existence of a price differential over an extended period of time creates an inference of injury to competition.[23] Long term contracts are common and provide benefits to both programmers and distributors, as well as consumers. There is no basis for punishing programmers for entering into long-term contracts.

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[22] See, e.g., Richard Short Oil Co. v. Texaco, Inc., 799 F.2d 415, 420 (8th Cir. 1986). The Commission should also follow the alternative holding of that case that secondary line injury is not actionable if caused by the inefficiency, lack of financial reserves, or bad management of the complainant. Id. at 421.

[23] FTC v. Morton Salt Co., 334 U.S. 37, 50-51 (1948).

4. The Commission Should Apply Section 628 Prospectively Only

The Commission seeks comment on whether its regulations to implement Section 628 should be applied retroactively. While noting that the "statute is silent concerning enforcement of anti-discrimination rules with respect to existing contracts," it tentatively concludes that "any pricing policies or restrictions developed to implement Section 628 should not be applied retroactively against existing contracts."[24]

As explained below, relevant case law strongly supports the Commission's tentative conclusion not to abrogate existing program distribution contracts. Even without this judicial mandate, the Commission as a matter of policy should only enforce Section 628 prospectively. Principles of fundamental fairness require that the Commission, except in extraordinary circumstances, decline to abrogate a contract which, when it was originally entered into, was perfectly lawful. Contracting parties should not be held to knowledge of the law at a time when the law is not susceptible to knowledge.[25] Thus, based upon both judicial mandate and a basic sense of fairness, the Commission should apply Section 628 prospectively.

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[24] See Notice at para. 27.

[25] See Singer, Sutherland Statutory Construction, § 41.02 (Sands 4th ed. 1992).

Generally, a retroactive law is defined as one which impairs or removes rights vested under existing laws, imposes new duties, creates new obligations, or attaches new disabilities to past transactions.[26] While it is well-settled that Congress can retroactively impair private contracts through the use of federal legislation,[27] the Supreme Court in Bowen v. Georgetown University Hospital,[28] held that "[r]etroactivity is not favored in the law" and that "congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result."[29] Although the Supreme Court has not reconciled this holding with other decisions which permit retroactive application of statutes,[30] it is nevertheless clear that Congressional intent is the key arbiter of retroactive application of statutes.[31] In addition, the Bowen Court clearly states that "a statutory grant of legislative rulemaking authority will not, as a general matter, be understood to

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[26] See Campbell v. United States, 809 F.2d 563, 571 (9th Cir. 1987); see generally Singer, id. at § 41.01; Black's Law Dictionary 1317 (6th ed. 1990).

[27] See Norman v. Baltimore & O.R. Co., 294 U.S. 240 (1935).

[28] 488 U.S. 204 (1988).

[29] Id. at 208 (emphasis added).

[30] See Kaiser Aluminum & Chem. Corp. v. Bonjorno, 494 U.S. 827, 836-37 (1990); and Bradley v. School Board, 416 U.S. 696 (1974).

[31] Kaiser Aluminum & Chem. Corp. at 837. Accord Wagner Seed Co., Inc. v. Bush, 946 F.2d 918, 924 (D.C. Cir. 1991).

encompass the power to promulgate retroactive rules unless that power is conveyed by Congress in express terms."[32]

The Commission is correct that the statute does not compel retroactivity. Moreover, there is nothing in the legislative history of the Act suggesting that Congress intended existing program distribution contracts to be abrogated or that program access and carriage regulations promulgated by the Commission should apply retroactively. Indeed, the only clear expression of Congressional intent on the treatment of existing contracts regarding licensing agreements between broadcasters and program suppliers specifically protects existing licensing agreements.[33] Thus the Commission's tentative conclusion that Section 628 should not be applied retroactively is correct and, according to Supreme Court precedent, must be adopted.

5. Discounts Based on the Number of Subscribers Served by a Distributor Are Permissible Under Section 628

Discounts based on the number of subscribers (or as the Commission characterizes the practice in paragraph 15 -- a "graduated pricing structure") are permissible under the Act. Section 628 specifically permits price differentials resulting from "economies of scale, cost savings, or other direct and

[32] Bowen, 488 U.S. at 208 (emphasis added).

[33] See Section 628(h)(1), 47 U.S.C. § 548.

legitimate benefits reasonably attributable to the number of subscribers served by the distributor."[34] In expressly permitting this practice, Congress recognized longstanding business practice and legal precedent. Volume discounts are a common method employed by sellers in many industries to induce buyers to purchase greater quantities.[35]

The Commission itself has held, in connection with price differentials between cable operators and HSD distributors, that "volume discounts [based on number of subscribers] are not a *per se* violation of Section 202(a)" (the anti-discrimination provision of the Communications Act).[36]

In a recent case involving TCI, the Commission imposed certain conditions on a construction permit granted to TEMPO, a DBS affiliate of TCI, among them a condition prohibiting TEMPO's granting TCI subscribers "terms and conditions different from

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[34] § 628(c)(2)(B)(iii). The legislative history of the Act further supports the notion that volume discounts are permissible. The Conference Report states that "In lieu of permitting volume discounts, the Conference agreement ... permits such vendors to establish different prices, terms and conditions ... reasonably attributable to the number of subscribers served by the distributor." Conference Report at 93 (emphasis added). Although some may construe the "in lieu of" language as expressing Congressional intent to prohibit volume discounts, such construction is clearly incorrect. By retaining the phrase "reasonably attributable to the number of subscribers served by the distributor"--the very definition of a volume discount--the Conference left no doubt that the Act specifically permits such discounts.

[35] *See generally* Besen Paper.

[36] *See In Re Inquiry into the Existence of Discrimination in the Provision of Superstation and Network Station Programming*, 5 FCC Rcd 523, 528 (1989); *see also 1990 Cable Report*, 5 FCC Rcd. at 5032.

those offered or provided to consumers who are not subscribers to TCI-affiliated cable systems." Notably, however, the Commission held that "this restriction . . . is not intended to preclude TEMPO from using legitimate sales practices, such as volume discounts, on a non-discriminatory basis." (Emphasis added.)[37]

In so holding, the Commission was following earlier precedent in which it declined to apply a fully distributed cost (FDC) standard to volume discounts:

> We first consider the question of whether all volume discounts which cannot be justified through an FDC study injure competition to the detriment of consumers. There is a difference between injuring competition and injuring, or even forcing into bankruptcy, a competitor. Inefficient competitors can be driven out of a market by normal price competition; yet, this competition benefits consumers by lowering the price and raising the quality of services and products available to them. In contrast, actions which exclude efficient competitors from a market may harm consumers by allowing the remaining firm or firms profitably to provide unreasonably high-priced or poor-quality services and products. (citing cases)
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> * * *
>
> Many other courts and scholars found that maintaining a price floor above marginal cost, such as FDC pricing for volume discounts, encourages underutilization of productive resources and impairs competition on the basis of relative efficiency. These results are contrary to the goals of the Communications Act. We reject claims that all volume discounts for private line and

[37] Application of TEMPO Satellite, Inc., 7 FCC Rcd 2728, 2732 (1992).